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No. 854

In the Supreme Court of the United States

October Term, 1962

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v.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 894

TOFFENETTI RESTAURANT COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 41–42) is reported at 311 F. 2d 219. The Board's decision and order (B.A. 2–10) [1] are reported at 136 NLRB 1156.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1962 (Pet. 41–42), and a petition for rehearing *en banc* was denied on December 26, 1962 (Pet. 43). The petition for certiorari was filed on March 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "B.A." refers to the appendix to the Board's brief in the court below.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner discriminated against union members and refused to bargain with a duly certified union in violation of Sections 8(a) (1), (3), and (5) of the National Labor Relations Act.

2. Whether the Board's order is valid and proper.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 6–7 of the petition.

STATEMENT

The Board's Findings of Fact.—On February 29, 1960, Dining Room Employees Local 1, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, filed a representation petition with the Board for a unit of "all waiters, waitresses, and busboys" at petitioner's New York City restaurant (B.A. 13; 197–200). Thereafter, the Bartenders Union of New York City, Local 15, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, filed a petition for a unit of the bartenders at the restaurant (B.A. 13–14; 200–203), and the Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 89, AFL–CIO, filed a petition for a unit of all the employees working in the kitchen (B.A. 13–14; 203–206).

On March 22, petitioner and the unions entered into a stipulation for the conduct of representation elections by the Board on April 29, 1960 (B.A. 14; 207–

219). Prior to the elections, petitioner's chairman, Mr. Toffenetti, distributed a series of letters to the employees, some by mail and others with their paychecks. In these letters he outlined the benefits which the employees had received from him without a union, including twice a year bonuses and a profit-sharing retirement plan.[2] He pointed out that his promises were "guaranteed." Toffenetti also implored the employees to "Vote for Toffenetti" and "Vote No Union," to join "His Crusade and His Loyalty Parade," and to pray for "Victory for Toffenetti" (B.A. 14; 282–299, 302–303).

At the elections held on April 29, a majority of the waiters, waitresses, and busboys voted in favor of representation by Local 1 (B.A. 14–15; 217–219). A majority of the employees in each of the other two units voted against union representation (B.A. 15; 219–222). On May 9, 1960, Local 1 was certified by the Board (B.A. 15; 223–224).

In June and July 1960, Local 1 engaged in contract negotiations with petitioner (B.A. 15; 59). The Union proposed that the waiters, waitresses, and busboys be included in its industry-wide pension plan (B.A. 32; 62, 94). Petitioner's counsel replied that,

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[2] The profit-sharing plan was instituted informally by petitioner in 1948. In 1956, petitioner formalized this plan by an agreement and declaration of trust entitled the "Toffenetti Fifteen Year Profit Sharing Plan," effective August 1, 1955. Under this agreement, petitioner contributes to the plan 15 percent of its profits for each fiscal year, but not more than the amount allowable as a deduction under the Internal Revenue Code provisions for qualified profit-sharing plans (B.A. 30–31; 224–258).

if those employees were included in that plan, the Company would have to exclude them from its profit-sharing plan, since it could not afford to contribute to both (B.A. 32; 62, 94). When the Union insisted that contribution by petitioner to its pension plan was a "must," the parties agreed that the employees in the unit would be eliminated from the Toffenetti profit-sharing plan, and that petitioner would begin contributing to the Union's pension plan on January 1, 1962. It was further agreed that the unit employees would receive their "vested" interests in the profit-sharing plan in accordance with the terms of the plan, and after Treasury Department approval of the distribution (B.A. 32–33; 62–63, 94–95, 289; General Counsel's Ex. 5).

On several occasions during the negotiations, union representatives requested copies of the profit-sharing plan in order to ascertain its terms. They were informed that the plan was in Chicago, but that a copy would be furnished the Union as soon as possible (B.A. 33; 66, 96). The parties also agreed that the Union would have the right to verify that the amounts to be paid to the unit employees upon the distribution of their shares in the plan were correct and in conformity with the plan's terms (B.A. 33–34; 98–99, 291).

During the negotiations, petitioner first offered a wage increase of $1 per week, and later $2 per week. The union representatives inquired whether this offer was in addition to bonuses (B.A. 17; 69–70). Petitioner's counsel replied that bonuses were a gift from the petitioner to its employees and not subject to ne-

gotiation. The union representatives stated that the employees had received bonuses for 20 years and had come to expect them as part of their wages; that they were calculated on a percentage of the employees wages, and had approximated about $2 per week on an annual basis; and that, unless bonuses were continued, the employer's offer of $2 was not an increase over the wages previously paid (B.A. 17; 70). Petitioner's counsel then replied that the economic position of the Company was such that it would have to eliminate bonuses for everybody (B.A. 18; 70–71, 100). He further stated that "in the future, should business warrant it, bonuses would be given again to all employees" (B.A. 18; 71).

On October 14, 1960, Local 1 and petitioner entered into a contract, which was to continue in effect until July 31, 1963 (B.A. 15; 263–278). Under the contract, the employees in the unit received a $3 per week increase retroactive to June 7, 1960, and additional wage increases of $1.50 per week in June 1961 and June 1962. Petitioner agreed to contribute, beginning January 1, 1961, to the Union's welfare fund, and, beginning January 1, 1962, to the Union's industry-wide pension plan (B.A. 15–16; 263–278).

On November 1, 1960, petitioner's directors met and amended the profit-sharing plan, without any notification to, or consultation with, Local 1. The amendment made any employee ineligible to participate in the plan who was then or later became a member of a union with which petitioner had a collective-bargaining agreement under which it was obligated to make contributions to a union welfare, disability,

or pension plan. The ineligibility became effective on the date union membership was acquired (B.A. 34–35; 259–262). The amendment also provided that an ineligible employee's share in the plan was to be computed at the end of the fiscal year in which he became ineligible, at the reduced percentages applicable to an employee who had voluntarily quit petitioner's employ or had been discharged for reasons other than aggravated misconduct.[3] The amendment further provided that the remaining percentage of the union employee's share was to be forfeited to the accounts of those who remained participants (B.A. 35; 261–262).

On December 8, 1960, petitioner called a meeting of all employees (B.A. 18; 73, 136). In past years, Chairman Toffenetti had announced the amount of the Christmas bonus at such meetings (B.A. 18; 135–136). This time, he referred to the "trouble" that had occurred during the year; stated that he could not help but be everlastingly grateful to those employees who had voted for him and "sorry in his heart" for those who had voted against him; and, holding up a wallet, he announced that he was giving wallets to the employees as a Christmas gift (B.A. 18–19; 74, 136–137). Employees who had been in

[3] The plan allowed immediate payment of the full amount of their shares to employees who became permanently disabled, died, or were dismissed from employment through no fault of their own. Those employees who quit or were discharged for less than aggravated misconduct received only a percentage of their shares, and this was not paid until they had been in the plan for 15 years or had reached age 65, except in case of death or permanent disability (B.A. 31–32, 33; 224–258).

petitioner's employ prior to January 1, 1960, and were not in the unit represented by Local 1, were given wallets, their regular payroll checks, and bonus checks; the employees represented by Local 1 were given only their regular checks and empty wallets (B.A. 19; 74).

Shortly after returning to his station from this meeting, Shop Steward David Dagger learned for the first time that the unrepresented employees had received bonuses (B.A. 19; 137). Seeing Chairman Toffenetti at the rear of the restaurant, Dagger complained that he was discriminating against the employees represented by the Union by giving bonuses to the unrepresented employees only. Toffenetti replied, "They showed their confidence in me and I couldn't let them down" (B.A. 19; 88, 90, 137–138). He added, "Well, if you had come to me in the first place, you wouldn't have this trouble" (B.A. 19; 89, 91, 138). Dagger said that this did not answer his question, whereupon Toffenetti asserted that the bonus was "more or less to equalize pay" (B.A. 19; 138). Dagger pointed out that the unrepresented employees had received the same benefits gained by the union-represented employees under the contract, and Toffenetti replied, "I have always given bonuses to my loyal employees" (*ibid.*).

In January 1961, Union Agent Pola and Dagger met with Chairman Toffenetti and General Manager Coscette and again protested the discriminatory payment of bonuses. Toffenetti repeated that the bonus was to equalize the wages between the unrepresented

employees and the union represented employees (B.A. 19–20; 107–108). Pola also brought up the question of when the unit employees would receive their profit-sharing distribution (B.A. 36; 108, 140). Toffenetti explained that the Treasury Department had still not approved the distribution, but indicated that the checks had already been prepared (*ibid.*). Dagger was shown his check, which indicated that he had been in the plan for 11 years, and was receiving 80 percent of his share (B.A. 36; 108–109). It was pointed out that the amounts were computed by using the percentages applicable to employees who quit petitioner's employ (B.A. 36; 155–157, 306a–306k).

In February 1961, General Manager Coscette called Union Agent Pola and told him that the distribution of the shares of the unit employees in petitioner's profit-sharing plan had been approved. Pola asked that the distribution be held up because the Union felt the employees were entitled to receive 100 percent of their shares (B.A. 37; 109–110). Pola then called Toffenetti in Chicago, and made the same request. Toffenetti stated that he would rather distribute the checks immediately and hold a meeting later. Pola agreed to this, without prejudice to the employees' right to object to the amounts of their checks. During this conversation, Pola again asked for a copy of the profit-sharing plan, which the Union still had not received. Toffenetti agreed to furnish a copy at the conference (B.A. 37; 110–111).

On March 3, 1961, petitioner distributed the profit-sharing checks to the unit employees. They received a total of $27,933.83. However, a total of $11,024.65 was "forfeited" by these employees and reallocated to the remaining nonunion participants in the plan. The highest percentage received by any employee from his account was 80 percent; employees with less than five years' participation received nothing (B.A. 37; 306a–306k).

On March 17, representatives of the Union and petitioner met at the Union's office. Pola sought to discuss the amounts which had been paid the unit employees in liquidation of their interests in the profit-sharing plan. Pauline Teitelbaum, petitioner's new attorney, replied that she could not understand the purpose of the meeting, since the profit-sharing plan was a "private affair" and not a subject to be discussed with the Union (B.A. 37–38; 74–75). Several times during the meeting, she refused to permit the union representatives to have a copy of the plan or its amendment (B.A. 38; 75–77, 78, 111–114). The meeting ended without resolving the dispute over the correctness of the profit-sharing payments made to the unit employees (B.A. 38; 76).

The Board's Conclusions and Order.—The Board concluded that petitioner's action in discontinuing bonus payments to employees in the unit represented by the Union, in paying employees represented by the Union a reduced sum for their interests in the profit-sharing plan, and in disqualifying any employee who became a union member from participation in its profit-sharing plan was motivated by a desire to penal-

ize the employees for selecting the Union and discriminated against members so as to discourage union membership. Accordingly, the Board held that, by such action, petitioner violated Sections 8(a) (3) and (1) of the Act (B.A. 20, 30, 42–43, 44, 47). The Board further concluded that petitioner refused to bargain with the Union in good faith in violation of Section 8(a) (5) and (1) of the Act by the unilateral effectuation of these discriminatory policies, and by refusing to furnish the Union, upon its request, with a copy of the profit-sharing plan and its amendment (B.A. 39–42, 47).

The Board's order requires petitioner to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act (B.A. 3–4). Affirmatively, the order directs petitioner: (1) to make available to the Union a copy of the profit-sharing plan and any amendments upon request; (2) to eliminate from the profit-sharing plan the provision making non-union membership a requirement for eligibility, and the distribution provision which discriminates against employees who become union members; (3) to restore to the accounts in the profit-sharing plan of the employees represented by the Union the amounts which were forfeited pursuant to the amendment of the plan; (4) to make the employees represented by the Union whole for the nonpayment of the 1960 Christmas bonus; (5) and, upon request, to bargain collectively with the Union regarding the distribution or other disposition of the

amounts restored to the accounts in the profit-sharing plan of the employees in the unit. Petitioner is also ordered to post the usual notices (B.A. 4–6).

The Decision of the Court of Appeals.—The court of appeals, in a *per curiam* opinion, held that the Board's unfair labor practice findings were amply supported by the record and enforced the Board's order in full (Pet. 42).

ARGUMENT

1. Petitioner's principal contention is that the evidence is insufficient to support the Board's findings (Pet. 23–33). It is well established, however, that sufficiency of the evidence does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, it is apparent, as the court of appeals concluded, that there is ample support for the Board's findings. Chairman Toffenetti's opposition to the unionization of his employees (*supra*, p. 3), his statement to Union Steward Dagger that bonuses were paid only to "loyal" employees (*supra*, p. 7), and the lack of factual basis for Toffenetti's claim that the bonus was intended to equalize the pay of the unrepresented employees with that of the union employees (B.A. 22–23) warranted the Board in finding that petitioner's motive in withholding the annual Christmas bonus from the employees represented by Local 1, while paying it to the other employees, was to penalize the union members for having selected

the Union.[4] This illegal conduct furnishes a substantial basis for concluding that the same anti-union considerations prompted the amendment to the profit-sharing plan which excluded employees who had become union members and provided for the payment to those employees of their accrued shares at a reduced percentage. Moreover the amendment to the plan discriminated against union members in violation of Section 8(a) (3) and (1) of the Act, irrespective of petitioner's subjective intent. Union membership alone determined eligibility to participate in the amended profit-sharing plan, and employees who were thus rendered ineligible were "paid out" on a basis less favorable than that used for non-union employees who were discharged without fault. Such blatant discrimination based on union membership necessarily tends to discourage union membership and is barred by the Act. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 44–46.

2. Nor is there substance to petitioner's contention (Pet. 15–22) that the Board's order is improper. The Board having found, with the approval of the court

[4] The cases cited by petitioner (Pet. 33–34) are plainly distinguishable. As the Board pointed out (B.A. 28), the holdings in those cases that the disparate treatment of represented employees in respect to bonuses and other benefits was not violative of the Act rested on: (1) the absence of any independent evidence of discriminatory motivation; and (2) the existence of a wage or salary imbalance in favor of the represented employees as the result of benefits secured by union contracts. Here, on the other hand, there is independent evidence of discriminatory motivation and there was no wage or salary imbalance in favor of the employees represented by the Union.

below, that the amendment to the profit-sharing plan unlawfully discriminated against union members, petitioner no longer has a valid interest in the maintenance of such an illegal provision. Hence, the Board, in the exercise of its broad remedial authority under Section 10(c) of the Act, can properly require petitioner to delete that provision and to restore to the accounts in the profit-sharing plan the amounts which were forfeited pursuant to the illegal amendment. This remedy is tailored to the particular violation found, and merely serves to place the parties in the same position they were in before petitioner unilaterally amended the plan to discriminate illegally against union members. That the distribution under the amended plan may have been approved by the Treasury Department (see Pet. 18) does not require a different conclusion; that department was merely concerned with the question of whether the plan satisfied the requirements of the tax laws, and not with whether it contained any features which violated the National Labor Relations Act.

Finally, petitioner errs in assuming (Pet. 15–18) that the Board lacked jurisdiction to enter the order because the Union could have processed the questions involved under the grievance and arbitration procedure of the contract. Even if that machinery was available for the determination of questions involving unfair labor practices, it is clear that this would not deprive the Board of jurisdiction to provide a remedy for those unfair practices. Section 10(a) of the Act provides that the Board's power to prevent unfair

labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." See *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 47–49 (C.A. 9), certiorari denied, 324 U.S. 877.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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